No. 82-703

Office - Supreme Court, U.S.
FILED
OCT 20 1982
ALEXANDER L. STEVAS,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1982

BOROUGH OF MILLTOWN,
Petitioner,

and by separate petition

MIDDLESEX COUNTY UTILITIES AUTHORITY,
Petitioner,

v.

CITY OF NEW BRUNSWICK, and THE UNITED STATES OF AMERICA, by and through its ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

PETITION OF THE BOROUGH OF MILLTOWN FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ARNOLD K. MYTELKA,
Counsel of Record for Petitioner,
Borough of Milltown,
80 Park Plaza,
Newark, New Jersey 07102.
(201) 642-3900

CLAPP & EISENBERG,
A Professional Corporation,
Attorneys for Petitioner,
Borough of Milltown.

ROGER S. CLAPP,
ROBERT S. SEGUIN,
Of Counsel.

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-8611

Questions Presented for Review

1. Whether Congress intended the grant-conditioning power delegated to the United States Environmental Protection Agency (EPA) pursuant to 33 U.S.C. §1284 (b)(1)(A) to authorize regulation of a municipality that is neither a grantee nor a party contracting with a grantee—whether this is a case of regulatory overreach?

2. Whether Congress intended 33 U.S.C. §1284(b)(1)(A), which is part of the Federal Water Pollution Control Act of 1972, to abrogate an existing intermunicipal contract entered into in 1914, notwithstanding legislative history requiring EPA to "take into account the diversity of legal and financial factors that exist from jurisdiction to jurisdiction" and to permit "reasonable flexibility . . . that meets the unique requirements" of each jurisdiction?*

3. Whether Congress intended a rigid reading of 33 U.S.C. §1284(b)(1)(A) requiring absolute proportionality and disallowing flexibility—the impact of the Third Circuit's opinion below, or whether Congress intended "generally equitable" treatment with an "emphasis upon local flexibility", as held by the Ninth Circuit this year?**

4. Whether a court should accord full deference to an administrative agency where the questions presented are matters of statutory construction, not technical ex-

---

*2 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 1352-1353 (U.S. Government Printing Office, 1973).

** *Hotel Emp. Ass'n of San Francisco* v. *Gorsuch*, 669 F.2d 1305, 1308-09 (9th Cir. 1982).

pertise, and where the issue is the statutory jurisdiction of the agency itself?

5. Whether as a matter of constitutional law and policy, 33 U.S.C. §1284(b)(1)(A) should have been construed to avoid the contract impairment/due process issue resulting from a decision that derogates from substantial contractual rights under a long-standing written agreement?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTION AND STATUTE	2
STATEMENT OF THE CASE	2
ARGUMENT:	
Point I—Because the grant-conditioning power in Sec. 1284(b)(1)(A) is contractual in nature and attaches only to a party which "voluntarily and knowingly accepts the terms of the 'contract'", Congress never intended that statute to reach Milltown which neither applied for a grant nor contracted with a grantee. Certiorari should be granted and the contrary decision of the Court of Appeals should be reversed	4
A. Statutory context	4
B. Applicable legal principle	5
C. Statutory language	7
Point II—The Congressional purpose in enacting 33 U.S.C. Sec. 1284(b)(1)(A) was to get waste treatment plants built; and Congress intended the EPA in achieving that purpose to "take into account the diversity of legal and financial factors . . . from jurisdiction to juris-	

PAGE

diction" and to permit "flexibility in the design of a system of user charges that meets the unique requirements of" each jurisdiction. The Court of Appeals' decision contravenes this purpose and intent and should be reversed .. 10

A. Overriding purpose 10

B. Congressional intent 11

1. Flexibility 12

2. Self-sufficiency 14

3. Another purpose? 14

Point III—The Ninth Circuit's decision in *Hotel Emp. Ass'n of San Francisco* v. *Gorsuch*, 669 F.2d 1305 (9th Cir. 1982), correctly construed the Congressional intent underlying 33 U.S.C. Sec. 1284(b)(1) as requiring tolerance of local variations in user charge systems. The conflicting decision of the Third Circuit in this case should be reversed 17

Point IV—The Courts below erred in according full deference to the EPA where its statutory jurisdiction was at issue and technical expertise was not involved 19

Point V—The Third Circuit's construction of 33 U.S.C. Sec. 1284(b)(1)(A) derogates from Milltown's substantial contractual rights and thus creates a contract impairment/due process issue. The Third Circuit's decision should be reversed to avoid that result 20

Point VI—Certiorari should be granted 21

CONCLUSION 22

PAGE

APPENDIX:

A—Opinion of the United States Court of Appeals for the Third Circuit 1a

B—Judgment of the United States Court of Appeals for the Third Circuit 30a

C—Opinion of the United States District Court for the District of New Jersey 33a

D—Order of Dismissal, Remand, etc. of the United States District Court for the District of New Jersey 53a

PAGE

Table of Authorities

Cases Cited

American Iron and Steel Institute v. E.P.A., 526 F.2d 1027 (3d Cir. 1975), modified on other grounds, 560 F.2d 589 (3d Cir. 1977), cert. den., 435 U.S. 914 (1978) 19

Carroll Vocational Institute v. United States, 211 F.2d 539 (5th Cir.), cert. den., 348 U.S. 833 (1954) 9

Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979) 10

Federal Maritime Commission v. Seatrain Lines, 411 U.S. 726 (1973) 20

Gartner v. Soloner, 384 F.2d 348 (3d Cir. 1967), cert. den., 390 U.S. 1940 (1968) 10

Gonzales v. United States, 286 F.2d 118 (10 Cir. 1960), cert. den., 365 U.S. 878 (1961) 9

Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934) 20

Hotel Emp. Ass'n of San Francisco v. Gorsuch, 669 F.2d 1305 (9th Cir. 1982) .....i, 17, 18

Lynch v. United States, 292 U.S. 571 (1934) 20

Midwest Video Corp. v. F.C.C., 571 F.2d 1025 (8th Cir. 1978), aff'd, 440 U.S. 689 (1979) 20

New Brunswick v. Milltown, 135 N.J. Eq. 310, 38 A.2d 288 (Ch. 1944) 2

New Brunswick v. Milltown, 3 N.J. Super. 113, 65 A.2d 621 (App. Div. 1949) 2, 3, 7, 16

PAGE

Ogden v. United States, 303 F.2d 724 (9th Cir. 1962), cert. den., 376 U.S. 973 (1964) 9

Pennhurst State School v. Halderman, 451 U.S. 1 (1981) 4, 6, 7, 9, 12, 21

Pittston Stevedoring Corp. v. Dellaventura, 544 F. 2d 35 (2d Cir. 1976), aff'd sub. nom., Northeast Marine Co. v. Caputo, 432 U.S. 249 (1977) 22

Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir.), cert. den., 449 U.S. 889 (1980) 16

SEC v. Sloan, 436 U.S. 103 (1978) 20

Social Security Board v. Nierotko, 327 U.S. 358 (1946) 19

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 10

State of New Jersey, Dept. of Ed. v. Hufstedler, 662 F.2d 208 (3d Cir. 1981) 6

Stop H-3 Ass'n v. Coleman, 533 F.2d 434 (9th Cir.), cert. den., 429 U.S. 999 (1976) 9

Train v. City of New York, 420 U.S. 35 (1975) 5

United States v. Cartwright, 632 F.2d 1290 (5th Cir. 1980) 9

United States v. Clark, 445 U.S. 23 (1980) 15, 20

United States v. Johnson, 462 F.2d 423 (3d Cir. 1972), cert. den., 410 U.S. 937 (1973) 8

United States v. Palmeri, 630 F.2d 192 (3d Cir. 1980), cert. den., 450 U.S. 967 (1981) 8

Western Union Tel. Co. v. F.C.C., 541 F.2d 346 (3d Cir. 1976), cert. den., 429 U.S. 1092 (1977) 19

PAGE

United States Constitution Cited

Article I, Paragraph 8, Clause 1 ..... 2, 6, 21

Statutes Cited

28 U.S.C.:

Sec. 1284 2

Sec. 1291 2

Sec. 1442(a)(1) 2, 3

33 U.S.C. (Federal Water Pollution Control Act of 1972 ("Clean Water Act") 15

Sec. 1251(b) 12, 14

Sec. 1251(a)(4) 11

Sec. 1281(g)(1) 4, 11

Sec. 1283(a) 5, 6

Sec. 1284(b)(1) 2, 5, 17

Sec. 1284(b)(1)(A) ..... i, ii, 2, 4, 7, 9, 11, 12, 14, 17, 20, 21

Regulations Cited

40 C.F.R.:

Sec. 35.929-1 5

Sec. 35.929-2 5

PAGE

Other Authorities Cited

1 A Legislative History of the Water Pollution Control Act Amendments of 1972 (U.S. Government Printing Office, 1973):

295 13

368 14

371 14

2 A Legislative History of the Water Pollution Control Act Amendments of 1972 (U.S. Government Printing Office, 1973):

1352-1353 ..... i, 10, 11, 13, 14

1446 ..... 13, 14

S. Rep. No. 93-370, 95th Cong., 1st Sess. (1977) 15

1977 U.S. Code Cong. Ad. & News 4326, 4352 15

Webster's Third New International Dictionary, definition, "jurisdiction" 1227 (1963) 8

NO.

Supreme Court of the United States

OCTOBER TERM, 1982

BOROUGH OF MILLTOWN,

Petitioner,

and by separate petition

MIDDLESEX COUNTY UTILITIES AUTHORITY,

Petitioner,

v.

CITY OF NEW BRUNSWICK, and THE UNITED STATES OF AMERICA, by and through its ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

PETITION OF THE BOROUGH OF MILLTOWN FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinions Below

The Court of Appeals, Third Circuit, filed its opinion July 22, 1982. It is not reported (Appendix 1a-29a). The opinion of the District Court, New Jersey, is reported at 519 F. Supp. 878 (1981) (Appendix 33a-52a). The judgments are set forth below (Appendix 30a-32a, 53a-56a).

Jurisdiction

Jurisdiction of this Court is conferred by 28 U.S.C. §1284; that of the Court of Appeals by 28 U.S.C. §1291; and that of the District Court by 28 U.S.C. §1442(a)(1).

Constitution and Statute

United States Constitution, Article I, Paragraph 8, clause 1 is quoted below at page 6 and 33 U.S.C. §1284 (b)(1)(A) is quoted below at page 5.

Statement of the Case

In 1914, two New Jersey municipalities entered into a written contract to settle a dispute. For substantial consideration, the City of New Brunswick (New Brunswick) agreed to dispose of sewage delivered by the Borough of Milltown (Milltown). Both parties have performed the contract to date.

This sewage disposal contract has been twice sustained against challenges advanced by New Brunswick. See *New Brunswick* v. *Milltown,* 135 N.J. Eq. 310, 38 A.2d 288 (Ch. 1944); *New Brunswick* v. *Milltown,* 3 N.J. Super. 113, 65 A.2d 621 (App. Div. 1949).

In a new challenge, commenced in the Superior Court of New Jersey, New Brunswick again sought abrogation of its contract with Milltown. New Brunswick's complaint included a federal ground, namely, that 33 U.S.C. §1284(b)(1) required New Brunswick to charge Milltown for sewage disposal, its contractual obligation to the contrary notwithstanding.

The Complaint also named the Middlesex County Utilities Authority (MCUA), a regional sewage authority, as a party defendant. New Brunswick had contracted with MCUA for disposal of New Brunswick's sewage (including Milltown's). Milltown did not contract with MCUA. Milltown was not consulted and did not consent to New Brunswick's contract with MCUA.

The Complaint against MCUA sought an order requiring MCUA to directly charge Milltown for the cost of disposing of Milltown's sewage. MCUA denied it had the power to so act, alternatively crossclaimed against Milltown, and additionally brought a third party complaint against EPA.

EPA had previously withheld part of a grant it had made to MCUA for construction of treatment facilities. MCUA's third party complaint against EPA alleged the withholding was improper and sought payment. EPA removed to the District Court, 28 U.S.C. §1442(a)(1), and filed reponsive pleadings.

Cross-motions for summary judgment resulted in an order sustaining EPA's power to withhold the grant on the ground that Milltown, under its contract with New Brunswick, was not itself paying for sewage disposal. The balance of the case was remanded for adjudication of state issues.

Milltown and MCUA appealed. The Third Circuit affirmed. MCUA has petitioned for certiorari to this Court. Because of the obvious detriment to Milltown—the federal determination will likely be regarded as settled law and the New Jersey courts may well consider this novel precedent as a "material change" compelling abrogation of the Milltown/New Brunswick contract, see *New Brunswick* v. *Milltown*, *supra* (3 N.J. Super. at 121, 65 A.2d at 624)—Milltown seeks relief here.

ARGUMENT

An analysis of the issues is presented at Points I through V. A summary of the reasons why certiorari should be granted is set forth at Point VI.*

POINT I

Because the grant-conditioning power in §1284(b)(1)(A) is contractual in nature and attaches only to a party which "voluntarily and knowingly accepts the terms of the 'contract' ", Congress never intended that statute to reach Milltown which neither applied for a grant nor contracted with a grantee. Certiorari should be granted and the contrary decision of the Court of Appeals should be reversed.**

A. Statutory context.

The statute in question is part of a grant program: 33 U.S.C. §1281(g)(1) authorizes "grants to any State, municipality, or intermunicipal or interstate agency for the construction of publicly owned treatment works." Pursuant thereto, MCUA applied for a grant and EPA awarded the grant.

---

* Milltown's perspective is different than that of MCUA. Indeed, these parties are adversaries in pending State court proceedings involving related issues. Nevertheless, Milltown finds itself in substantial agreement with the analysis set forth in MCUA's petition for certiorari, at pages 8 to 22, and respectfully relies upon the points advanced therein.

** *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 17 (1981).

The grant program is contractual in nature. The applicant submits a proposal and the EPA Administrator's "approval of any such plans, specifications, and estimates shall be deemed *a contractual obligation* of the United States for the payment of its proportional contribution to such project." 33 U.S.C. §1283(a); emphasis added. As such, the legislation is unusual because Congress has agreed in advance of appropriations to fund what has been contractually obligated within certain authorization limits. See *Train* v. *City of New York*, 420 U.S. 35, 39 at n. 2 (1975).

The statutory section at issue here is a component of the contractual grant program. It provides that:

> ". . . the Administrator shall not approve any grant for any treatment works under Section 1281(g)(1) [quoted above] . . . unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Administrator, will pay its proportionate share . . . of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant. . . ." 33 U.S.C. §1284(b)(1).

Acting under this section, EPA promulgated regulations, 40 C.F.R. §35.929-1 and 2, and withheld grant funds from MCUA for alleged non-compliance.

B. Applicable legal principle.

Unlike an administrative agency's plenary regulatory authority, regulations that are based on grant conditions depend upon consent.

Because the power to make and condition grants derives from the Constitution's Spending Power Clause,* grant statutes are "voluntary and the States [or, as here, instrumentailties of the States] are given the choice of complying with the conditions set forth in the Act or foregoing the benefits of federal funding." *Pennhurst State School* v. *Halderman*, supra, 451 U.S. at 11.

As such, grants and conditions thereto are:

> ". . . in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State *voluntarily and knowingly accepts the terms of the 'contract.'* [Authorities omitted.] *Id.* at 17 (emphasis added); *accord*, *State of New Jersey, Dept. of Ed.* v. *Hufstedler*, 662 F.2d 208, 214 (3d Cir. 1981).

As indicated above, the statute in question here provides for "a contractual obligation of the United States," 33 U.S.C. §1283(a), and is therefore consistent with the Supreme Court's analysis in *Pennhurst*.

Acceptance of the grant by MCUA supplies its consent. New Brunswick's agreement to dispose of its sewage through MCUA's facility may supply New Brunswick's consent.

But nothing supplies Milltown's consent. It has neither applied for a grant, nor contracted with a grantee. Certainly, New Brunswick's unilateral decision to dispose of Milltown's sewage—which New Brunswick is bound by

---

* The Congress shall have Power To . . . provide for the . . . general welfare of the United States. . . ." *US. Const.*, art. I, §8, cl. 1.

agreement to receive—through MCUA's facility cannot be construed as Milltown's consent to EPA grant conditions.

Thus, Milltown cannot be said to have "voluntarily and knowingly" accepted the terms of "the contract." *Pennhurst State School* v. *Halderman, supra,* 451 U.S. at 17. In this context, taken together with the unique overlay of the Milltown/New Brunswick agreement, it is clear that Congress did not intend that 33 U.S.C. §1284(b)(1)(A) should reach a municipality that was neither a grantee nor a party contracting with a grantee.

C. Statutory language.

The statutory language is consistent with the above analysis. Section 1284(b)(1)(A) reaches "each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Administrator. . . ." The District Court cited the dictionary definition of "recipient" as "one that receives" and concluded that "Milltown is inarguably a 'recipient' of MCUA's treatment services" because Milltown's sewage "receives its only treatment from the MCUA system" (519 F. Supp. at 882; Appendix 40a). The Court of Appeals agreed with the District Court, although it admitted that Milltown was only an indirect recipient (Appendix 13a).

The analysis is erroneous because Milltown receives nothing *from MCUA*. By contract with New Brunswick, Milltown has the right to transmit sewage through a 12 inch pipe to New Brunswick, nothing more. *New Brunswick* v. *Milltown, supra* (3 N.J. Super. at 121, 65 A.2d at 624).

Once the sewage crosses into New Brunswick, the sewage belongs to New Brunswick to dispose of it as it sees fit. Milltown has no right to require or even request that

the sewage be treated in any particular way or by any particular agency. The sewage belongs to New Brunswick, not Milltown, and New Brunswick alone is the "recipient" of any treatment services from MCUA which New Brunswick elects to enjoy. For federal statutory purposes, the sewage should be dealt with no differently than sewage piped from a New Brunswick city facility.

Of even greater significance is the fact that the word "recipient" is limited by the phrase "within the applicant's jurisdiction."*

Plainly, Congress contemplated recipients that are both within and *not* "within the applicant's jurisdiction." Otherwise, the quoted phrase would be surplusage. See *United States* v. *Palmeri*, 630 F.2d 192, 199 (3d Cir. 1980), *cert. den.*, 450 U.S. 967 (1981) ("We should not construe a statute to make it redundant of itself. . . ."); *United States* v. *Johnson*, 462 F.2d 423, 428 (3d Cir. 1972), *cert. den.*, 410 U.S. 937 (1973) ("words in statutes should not be construed as excess verbiage"). The question, then, is which recipients are "within the applicant's jurisdiction" and, more particularly, what did Congress mean by "jurisdiction."

It is appropriate to start with the dictionary definition of "jurisdiction." After defining jurisdiction in judicial terms, *Webster's* gives a second definition, "authority of a sovereign power to govern or legislate: *power or right to exercise authority,*" and, for a synonym, "see POWER." *Webster's Third New International Dictionary* 1227 (1963); emphasis added.

Judicial definitions are to the same effect. Dealing with the crime of making a false statement in a matter within

---

* The final words—" as determined by the Administrator"—obviously call for a test of reasonableness.

the jurisdiction of a federal department or agency, the Ninth Circuit held "jurisdiction" to be synonymous with *"power to act,"* and the Fifth Circuit concurred. *Ogden* v. *United States,* 303 F.2d 724, 743 (9th Cir. 1962), *cert. den.,* 376 U.S. 973 (1964); *United States* v. *Cartwright,* 632 F.2d 1290, 1292 (5th Cir. 1980); emphasis added.

In the context of a statutory grant of subpoena authority to the Veterans' Administration for matters within its jurisdiction, the Fifth Circuit defined "jurisdiction" as "the right to say and *the power to act;* and, as between agencies of the government, jurisdiction is *the power of that particular agency to administer and enforce the law."* *Carroll Vocational Institute* v. *United States,* 211 F.2d 539, 540 (5th Cir.), *cert. den.,* 348 U.S. 833 (1954) (emphasis added); *accord, Stop H-3 Ass'n* v. *Coleman,* 533 F.2d 434, 441 at n. 13 (9th Cir), *cert. den.,* 429 U.S. 999 (1976); *Gonzales* v. *United States,* 286 F.2d 118, 123 (10th Cir. 1960), *cert. den.,* 365 U.S. 878 (1961).

In summary, the plain meaning of the Congressional language in 33 U.S.C. §1284(b)(1)(A) is that the section was designed to reach *only* recipients within MCUA's ("the applicant's") power to act ("jurisdiction"). It is undisputed that MCUA has no power to act with respect to Milltown because Milltown is not a subscriber to services provided by the MCUA.

Alternatively, it is even more obvious that the statutory language is not free from ambiguity, as is necessary before a user charge requirement can be imposed on Milltown. "If Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State School* v. *Halderman, supra,* 451 U.S. at 17.

POINT II

The Congressional purpose in enacting 33 U.S.C. §1284 (b)(1)(A) was to get waste treatment plants built; and Congress intended the EPA in achieving that purpose to "take into account the diversity of legal and financial factors . . . from jurisdiction to jurisdiction" and to permit "flexibility in the design of a system of user charges that meets the unique requirements of" each jurisdiction.* The Court of Appeals' decision contravenes this purpose and intent and should be reversed.

A. Overriding purpose.

Although "[t]he starting point in every case involving construction of a statute is the language itself," *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979), the judicial task is "to interpret the words of . . . statutes in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). Thus, in construing a statute, "the court must consider the purpose of its enactment, the evil to be eradicated, the object to be obtained and recognize the construction that would best effectuate those standards." *Gartner* v. *Soloner*, 384 F.2d 348, 355 (3d Cir. 1967), *cert. den.*, 390 U.S. 1040 (1968).

The overriding policy applicable to waste treatment grants is to provide financial assistance "to construct publically owned waste treatment works" so as "to restore and maintain the chemical, physical, and biological in-

---

*2 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 1352-1353 (U.S. Government Printing Office, 1973).

tegrity of the Nation's waters." 33 U.S.C. §1251(a)(4); see 33 U.S.C. §1281(g)(1). While a proportional system of charges, 33 U.S.C. §1284(b)(1)(A), may be of some help in the overall decontamination process, the baby is thrown out with the bathwater if, in an attempt to achieve the fringe benefit, the treatment plant itself is not constructed or maintained. Yet that is the position of the EPA and that is the possible result of the Court of Appeals' decision in this case.

In most cases, the applicant and those who subscribe to its services will voluntarily comply with grant conditions, including the system of charges required by 33 U.S.C. §1284(b)(1)(A), to obtain available federal funding. Here, however, a unique situation obtains. Milltown has pre-existing contractual rights and the applicant—MCUA—has no power to compel Milltown to waive those rights.

Surely, Congress did not intend to withhold financial aid to MCUA in these circumstances and thereby to defeat the overriding objective of the act, namely, to get waste treatment facilities built. The statutory construction that "would best effectuate" the Congressional purpose is to read the words "within the applicant's jurisdiction" as excluding municipalities like Milltown that are not within that jurisdiction.

B. Congressional intent.

Neither legislative history, see *A Legislative History of the Water Pollution Control Act Amendments of 1972* (U.S. Government Printing Office, 1973) (hereinafter "Legislative History"), nor any other guides to Congressional intent, confront and solve the precise problem before this Court. Nevertheless, it is valuable to examine what evi-

dence of intent exists and to draw the appropriate inferences. As already indicated, the contractual nature of the constitutional power exercised by Congress, the legislative language used, and the overriding policy of the statute, all demonstrate that Congress did not intend to bind a municipality like Milltown to grant conditions set forth in 33 U.S.C. §1284(b)(1)(A). In addition, there are these points:

1. Flexibility.

At the outset of the act, Congress articulated its policy of shared federal-state responsibility:

> "It is the policy of the Congress to recognize, preserve, and protect *the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. *It is the policy of Congress that the States manage the construction grant program* under this chapter. . . ." 33 U.S.C. §1251(b); emphasis added.

As with the legislation considered in *Pennhurst*, Congress here contemplated "federal-state cooperative programs." *Pennhurst State School* v. *Halderman, supra*, 451 U.S. at 11.

It is for this reason that flexibility in implementation of §1284(b)(1)(A) was emphasized in the legislative process. For example (to quote a committee report), while volume and character of each discharge were to be the basis of rate determination "[a]s a general rule,"

> "[t]hese [EPA] guidelines [regulations] should take into account *the diversity of legal and financial factors that exist from jurisdiction to jurisdiction,* and each applicant should be permitted *reasonable flexibility* in the design of a system of user charges that meets *the unique requirements of his own jurisdiction.*" 2 *Legislative History, supra,* 1352-1353; emphasis added.

In quoting this committee report, which gave the "general rule" and the flexibility exception, Senator Muskie commented on the Senate floor:

> "*But the flexibility point is emphasized,* and I think should be, because we are trying to encourage experiments and flexibility." *Id.* at 1353; emphasis added.

And Senator Nelson replied:

> "Mr. President, I thank the Senator. I had assumed, from looking at the act, that that was the intent, but I appreciate the clarification, *so that the legislative intent will be clear from our discussion on the Senate floor.*" Id. at 1353; emphasis added.

To the same effect, see 1 *Legislative History* 295; 2 *Legislative History* 1446.

In the case at bar, the Court will discern absolutely no regard by EPA, or by the Courts below, for the legislative intent concerning flexibility that was to be "clear from our discussion on the Senate floor."* No consideration is

---

* The District Court's discussion is superficial and unenlightening (519 F. Supp. at 883; Appendix 42a-43a), and the Court of Appeals completely sidesteps the issue by merely *assuming* that the goal of flexibility does not apply here. The question is begged and the matter is thereupon left. Appendix 22a.

given to "the diversity of legal and financial factors" and "the unique requirements" of the situation presented here. Certainly, this legislative history does not bespeak Congressional intent to ignore or violate the Milltown/New Brunswick contract—an obviously "legal and financial" factor, 2 *Legislative History* 1352-1353—or to overrule state instrumentalities in their exercise of their "primary responsibilities and rights." 33 U.S.C. §1251(b).

2. Self-sufficiency.

The charge system set forth in 33 U.S.C. §1284(b)(1)(A) has one central objective. As stated on the floor of the House of Reprsentatives, "[a]gain, I would like to stress the aim in making user charges is to enable each local system to *achieve self-sufficiency.*" 1 *Legislative History* 368. To the same effect, see 1 *Legislature History* 371; 2 *Legislative History* 1446.

Here, there is no evidence whatsoever that this objective will be compromised by honoring the Milltown/New Brunswick contract. New Brunswick has fully paid MCUA for every gallon of sewerage transmitted and there is no indication that it cannot or will not continue to do so. The lower Courts' speculation that New Brunswick might "break its contract with Milltown and cease paying for the costs of treating Milltown's wastes" (519 F. Supp. at 883; Appendix 42a and 24a n. 18) is patently lacking in record support. Speculation is not a sound basis for judgment. The aim of self-sufficiency is being achieved.

3. Another purpose?

Both lower Courts mistakenly assumed that one of the original Congressional purposes in enacting the subject

legislation was to promote water conservation. 519 F. Supp. at 883; Appendix 42a and 24a-25a. Based on that assumption, the lower Courts believed that Milltown's enactment of a user change would further the purpose of the statute. But the assumption is not valid because the legislative history is silent on the subject of conservation until five years later when (in 1977) Congress amended the Clean Water Act. S. Rep. No. 93-370, 95th Cong., 1st Sess. (1977), reprinted in 1977 *U.S. Code Cong. Ad. & News* 4326, 4352. The 1977 Senate Report states that user charges were "originally proposed" to assure "that each federally assisted facility would have adequate operation and maintenance funds." *Id.* at 4352. The Report then indicates that: "Further examination of the user charge concept revealed additional benefits." *Id.* The conservation purpose is then mentioned as one of the "additional benefits" discovered after enactment of the statute.

The 1977 commentary relied upon by the lower Courts is not the legislative history of the 1972 statute in issue here. "[T]he views of some Congressmen as to the construction of a statute adopted years before by another Congress have 'very little, if any, significance.' [Citations omitted.]" *United States* v. *Clark,* 445 U.S. 23, 33 at n. 9 (1980). As the Fifth Circuit put it:

> "The retroactive wisdom provided by the subsequent speech of a member of Congress stating that yesterday we meant something that we did not say is an ephemeral guide to history. . . . What happened after a statute was enacted may be history and it may come from members of the Congress, but it is not part of the legislative history of the original enactment.

• • •

> "Had this statement been made in the report of the Committee that recommended the legislation, it would indeed be part of the statutory history. When uttered five years later it is mere commentary." *Rogers* v. *Frito-Lay, Inc.*, 611 F.2d 1074, 1080, 1082 (5th Cir.), *cert. den.*, 449 U.S. 889 (1980).

Moreover, the 1977 amendments permit user charges to be based on ad valorem taxes or flat fees which, unlike metering, are not directly related to the use of water. Thus, despite lip service to water conservation in the legislative history of the 1977 amendments, the amendments themselves are contrary to that assumed objective.

Finally, there is no evidence in the record regarding any water conservation issue in this case. The Courts below speculate, but no proofs support their speculation. The lower Courts' "conservation" rationale is more makeweight than meritorious.*

In summary, to the extent that Congressional intent can be gleaned from legislative history, the clearest indication is that flexibility was the goal and unique legal and financial factors, such as those presented by the Milltown/New Brunswick contract, were to receive respect. To require Milltown to enact a user charge does not further the expressed Congressional objective that the EPA should cause waste treatment plants to be built, and such a requirement is also contrary to the expressed Congressional prescription that the EPA, in carrying out the Congressional mandate, should be flexible in designing user charge systems and accommodate the unique legal and financial characteristics of each jurisdiction.

---

* There is a cap on New Brunswick's obligation to Milltown: what can be transmitted through a 12-inch pipeline. *New Brunswick* v. *Milltown, supra* (3 N.J. Super. at 121, 65 A.2d at 624). This limitation is far more likely to result in overall conservation in the unique circumstances of this case than the more nebulous theory advanced by the lower Courts.

POINT III

The Ninth Circuit's decision in *Hotel Emp. Ass'n of San Francisco* v. *Gorsuch*, 669 F.2d 1305 (9th Cir. 1982), correctly construed the Congressional intent underlying 33 U.S.C. §1284(b)(1) as requiring tolerance of local variations in user charge systems. The conflicting decision of the Third Circuit in this case should be reversed.

In *Hotel Emp. Ass'n of San Francisco* v. *Gorsuch, supra*, the Ninth Circuit Court of Appeals construed 33 U.S.C. §1284(b)(1)(A) and the legislative history of that statute and reached a conclusion as to the Congressional intent which is the opposite of that reached by the Third Circuit in this case. It is Milltown's position that the Ninth Circuit is correct, and the conflicting decision of the Third Circuit below should be reversed.

In the Ninth Circuit case the plaintiff challenged the EPA's approval of a user charge system. The system charged costs in accordance with sewage flow (based on water consumption) and sewage strength (based on categories of users). While the system was rational, it did not adjust for the fact that sanitary and storm sewage were treated together. Thirty five percent of operating and maintenance costs reflected surface runoff, yet runoff depends upon acreage, not water consumption or sewage strength. Thus, the user charge system nowhere neared true proportionality.

The Ninth Circuit affirmed the District Court's ruling that

> "the section's legislative history suggests that Congress did not intend to impose an 'absolute proportionality' requirement and meant to require 'only

> proportionality which is generally equitable' . . . [P]roportionality, while a general requirement, was not a primary motivation for the enactment of the user fee requirement . . . Congress instead was primarily concerned with ensuring that treatment systems would be self-financing and was tolerant of local variations in user charge schemes so long as this basic requirement was met." 669 F.2d at 1308.

In conclusion, the Ninth Circuit again stressed "the importance Congress placed upon giving localities flexibility in designing user fee systems" and held:

> "The legislative history's emphasis upon local flexibility, however, persuades us against narrowly interpreting Section 204(b)(1) [§1284(b)(1)] to require localities to apportion treatment costs with exacting mathematical precision." 669 F.2d at 1309.

By way of support, the Ninth Circuit quoted (*Id.* at n. 6) the same legislative history language quoted in this petition's discussion of flexibility. (Above p. 13).

The Third Circuit decision below takes the opposite approach to the subject statute. Instead of honoring the Congressional objective of flexibility, the Third Circuit reads the statute narrowly and rigidly as requiring participation by each municipal user. The Third Circuit ignores the unique contractual arrangement between Milltown and New Brunswick.

The Ninth Circuit's construction of the statute carries out the will of Congress and should be followed. The conflicting approach of the Third Circuit should be rejected.

POINT IV

The Courts below erred in according full deference to the EPA where its statutory jurisdiction was at issue and technical expertise was not involved.

Milltown's position is that both Courts below erred in according full deference to the EPA's interpretation of the statute in question. When, as here, the issue involves the statutory jurisdiction of an agency, deference to the agency's own interpretation of the statute should not play a major part in the analysis.

In such circumstances, the Third Circuit had previously defined its scope of review as necessarily entailing "a first-hand judicial comparison of the claimed excessive action with the pertinent statutory authority." *Western Union Tel. Co.* v. *F.C.C.*, 541 F.2d 346, 354 (3d Cir. 1976), *cert. den.*, 429 U.S. 1092 (1977). The Court should itself examine "the entire statutory scheme and the legislative history" and accord deference to the agency's interpretation of the Act only if that interpretation is "more reasonable". *American Iron and Steel Institute* v. *E.P.A.*, 526 F.2d 1027, 1037, 1042 (3d Cir. 1975), *modified on other grounds*, 560 F.2d 589 (3d Cir. 1977), *cert. den.*, 435 U.S. 914 (1978). Thus, to quote this Court:

> "An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946).

Although no evidence of long-standing administrative construction was adduced in this case—the regulations do not expressly deal with the present situation—it is appropriate to note that even in that event "an agency may

not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." *Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726, 745 (1973); *accord*, *SEC* v. *Sloan*, 436 U.S. 103, 118-119 (1978).

In short, "[a]n agency can neither create nor lawfully expand its jurisdicti[on] by merely deciding what it thinks the future should be like . . . " and "the public interest is not served by agency actions beyond their jurisdiction." *Midwest Video Corp.* v. *F.C.C.*, 571 F.2d 1025, 1045 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

POINT V

The Third Circuit's construction of 33 U.S.C. §1284 (b)(1)(A) derogates from Milltown's substantial contractual rights and thus creates a contract impairment/due process issue. The Third Circuit's decision should be reversed to avoid that result.

This is a statutory construction argument that Milltown wishes to preserve, but concedes is not a proper basis for certiorari in its own right.

The point is that the impact of the administrative and judicial decisions below derogates from Milltown's "substantial contractual rights," *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 431 (1934); see *Lynch* v. *United States*, 292 U.S. 571 (1934); and that this impact could have been avoided—and should have been—by construing 33 U.S.C. §1284(b)(1)(A) as Milltown suggests. *See United States* v. *Clark*, 445 U.S. 23, 27 (1980).

The point can be developed if certiorari is granted.

POINT VI

Certiorari should be granted.

There is substantial error below. In addition, there are these reasons why certiorari should be granted:

1. This Court has not construed the federal statutory section in question here, nor any similar legislation. A decision on the merits will have nationwide impact on how the EPA deals with unique local requirements in this major grant program.

2. A significant federal effort to fund sewage treatment systems and ameliorate water pollution in urban/industrial areas like New Jersey may well be thwarted by the rigidly unrealistic and legally erroneous construction of 33 U.S.C. §1284(b)(1)(A) adopted by the Courts below. Congressional intent in a critical area will be frustrated absent intervention by this Court.

3. The authority of federal administrative agencies to reguate via grant conditions derives from Congressional exercise of constitutionally delegated spending powers. *U.S. Const.*, Art. I, §8, cl. 1. This Court commenced definition of the reach of grant-conditioning regulatory powers in an important decision last year. *Pennhurst State School* v. *Halderman*, 451 U.S. 1 (1981). The conduct of EPA, the judicial acquiescence in that conduct, the circumstances of this case, and the pervasiveness of federal grant programs, strongly demonstrate the need for further delineation here.

4. The Third and Ninth Circuits are in conflict in their interpretation of Congressional intent regarding the statute at issue here. The Third Circuit's attempt to reconcile divergent judicial philosophies by a footnote (Appendix 22a-23a, n. 17) is superficial in the extreme. The foot-

note accurately states that both decisions approve EPA action, but the *substance* of what was approved and the *principles* advanced are clearly in conflict.

5. It is time for this Court to sharply draw the line between areas of administrative expertise and those in which the courts are competent. There are parallel and conflicting lines of precedents "with the result that a court of appeals must choose the one it deems more appropriate for the case at hand." *Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F.2d 35, 49 (2d Cir. 1976) (Friendly, J.), *aff'd sub nom., Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249 (1977). This Court should curtail rubberstamp deference where, as here, the questions presented are matters of statutory construction, not technical expertise, and where the issue is the statutory jurisdiction of the agency itself.

CONCLUSION

For the reasons stated in Point VI, and because of the errors below (Points I through V), Milltown urges that certiorari be granted.

Respectfully submitted,

ARNOLD K. MYTELKA,
Counsel of Record for Petitioner,
Borough of Milltown.

CLAPP & EISENBERG,
A Professional Corporation,
Attorneys for Petitioner,
Borough of Milltown.

ROGER S. CLAPP,
ROBERT S. SEGUIN,
Of Counsel.